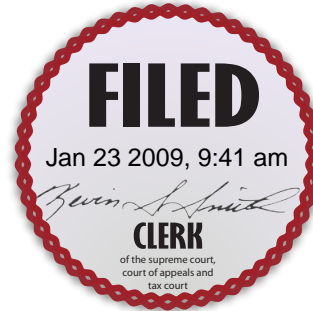


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

CHERI OKULY,)	
)	
Appellant-Petitioner,)	
)	
vs.)	No. 35A02-0805-CV-404
)	
MICHAEL ABBOTT,)	
)	
Appellee-Respondent.)	

APPEAL FROM THE HUNTINGTON CIRCUIT COURT
The Honorable Jeffrey R. Heffelfinger, Special Judge
Cause No. 35C01-9901-DR-18

January 23, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Petitioner Cheri Okuly (“Cheri”) appeals the trial court’s modification of child support payable by Appellee-Respondent Michael Abbott (“Michael”). We affirm.

Issue¹

We consolidate and restate Cheri’s issues as: Whether the trial court’s exclusion of Michael’s overtime income from the calculation of Michael’s child support obligation was clearly erroneous.

Facts and Procedural History

Cheri and Michael were divorced on February 11, 2000, and Cheri was awarded physical custody of their son, J.A., born January 23, 1992. Michael was ordered to pay child support, which amount was modified in 2003 and 2005.

On August 7, 2007, Michael filed a petition to modify custody and support, alleging that J.A. had resided with him since the beginning of summer. On November 21, 2007, Cheri filed a petition to modify visitation, modify child support, and oppose a change in custody. Before the hearing on the motions, Michael withdrew his petition for custody modification. After holding a hearing on January 11 and February 19, 2008, the trial court entered its order, including findings of facts and conclusions of law. The order required Cheri to reimburse Michael for the time J.A. lived with him because Michael continued to pay support during

¹ Cheri also states an issue of whether the trial court did not have the authority to order her to reimburse Michael for child support during the fifteen-week period that J.A. resided with him. She bases this issue on Michael withdrawing his petition for custody modification prior to the hearing. However, there is no indication that she raised this issue to the trial court. “As a general rule, a party may not present an argument or issue to an appellate court unless the party raised the same argument or issue before the trial court.” Crafton v. State, 821 N.E.2d 907, 912 (Ind. Ct. App. 2005). Therefore, Cheri has waived this argument.

that period. Because J.A. had since returned to living with Cheri, the trial court also recalculated Michael's child support obligation, resulting in an increase from \$102 to \$129 per week. Cheri now appeals.

Discussion and Decision

I. Standard of Review

Here, the trial court entered findings of fact and conclusions of law. Therefore, we apply a two-tiered standard of review: first, we determine whether the evidence supports the findings and second, whether the findings support the judgment. Freese v. Burns, 771 N.E.2d 697, 700 (Ind. Ct. App. 2002), trans. denied. We will only disturb the judgment where there is no evidence supporting the findings or the findings fail to support the judgment. Id. We do not reweigh the evidence, but consider only the evidence favorable to the trial court's judgment. Id. at 700-01. Challengers must establish that the trial court's findings are clearly erroneous. Id. Findings are clearly erroneous when a review of the record leaves us firmly convinced a mistake has been made. Id. However, conclusions of law are reviewed *de novo*, and a judgment is clearly erroneous if it relies on an incorrect legal standard. Id.

II. Analysis

Cheri argues that the trial court clearly erred by not including Michael's overtime income when calculating his child support obligations. Regarding the inclusion of irregular income, this Court has noted:

The Indiana Child Support Guideline's definition of weekly gross income includes overtime pay. *See* Ind. Child Supp. Guideline 3(A)(1). However,

such income can be “irregular or [non-guaranteed], which cause[s] difficulty in accurately determining the gross income of a party.” Ind. Child Supp. Guideline, Commentary 2(b). Thus, a determination as to whether overtime should be included in a parent’s weekly gross income is very fact sensitive. For that reason, when a trial court determines that it is not appropriate to include irregular income in the determination of a parent’s child support obligation, the trial court should express its reasons. In addition, the dependability of a parent’s overtime income and the parent’s ability to maintain such income are crucial factors in determining whether such income should be included in a parent’s weekly gross income. Therefore, the trial court must indicate in its findings and conclusions that it has considered those factors.

Railing v. Hawkins, 746 N.E.2d 980, 982 (Ind. Ct. App. 2001) (some internal citations omitted).

The trial court listed its reasoning for not including Michael’s overtime in the child support calculation:

- a. The Court finds that Michael’s income is irregular and non-guaranteed beyond his base salary of \$880.00 per week which salary is based on a 43.33 hour work week – see Respondent’s Exhibit A.
- b. Although Michael has earned overtime wages in the past, there is evidence that his overtime is subject to downturns in the economy and therefore should not be used to attribute a higher average weekly wage to him.
- c. The Court finds that even though Michael’s overtime pay may have been consistent over the last several years, there is no guarantee that overtime will continue in a poor economy.
- d. The [C]ourt finds that there is evidence from Michael’s employer that his business is entering into a time of economic uncertainty and therefore only Michael’s base salary should be used to calculate his new support obligation for [J.A.].

Appellant’s Appendix at 34.

Kim Conrad, the Human Resource Manager at Michael’s employer, testified that overtime for Michael was mandatory and was not consistent from week to week or month to

month. The mandatory overtime is announced weekly on Wednesday. Conrad also testified as to the current status of overtime in Michael's department:

Well, right now we've made some changes. Um, we've modified a paint line so right now it's very uncertain in the paint area because we went from nine (9) foot a minute to twelve (12) foot a minute. So if we are painting well theory would hold that overtime should go down. If we are painting bad overtime is actually going to go up because we have to finesse that product so that we can actually ship it.

Transcript at 90. Michael testified that his overtime is mandatory, not predictable and is based on customer requirements. This evidence supports the trial court's reasoning that Michael's overtime income is not dependable because it is subject to customer demands making it unpredictable. Furthermore, it can be reasonably inferred from Conrad's testimony as to the production change from a nine-foot per minute to a twelve-foot per minute in the paint department that a decrease in overtime is expected in the long run. Thus, Michael's past overtime would not accurately reflect his future overtime earnings. The trial court did not err by not including Michael's overtime in the calculation of the child support obligation.

Affirmed.

MATHIAS, J., and BARNES, J., concur.